No. 89-542

In the Supreme Court of the United States

OCTOBER TERM, 1989

RUDY PERPICH, GOVERNOR OF MINNESOTA, ET AL.,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the Montgomery Amendment, 10 U.S.C. 672(f), is a constitutional exercise of Congress's plenary authority to provide for the national defense under the Army Clause, U.S. Const. Art. I, § 8, Cl. 12, and thus not violative of the Militia Clauses, U.S. Const. Art. I, § 8, Cls. 15-16, which reserve to the States the authority to train the militia.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. A1-A62) is reported at 880 F.2d 11. The opinion of the panel (Pet. App. A63-A141), which was vacated by the court of appeals en banc (Pet. App. A62.1), is unreported. The opinion of the district court (Pet. App. A141-A153) is reported at 666 F. Supp. 1319.

JURISDICTION

The judgment of the court of appeals (J.A. 31-32) was entered on June 28, 1989. The petition for a writ of certiorari was filed on September 26, 1989, and was granted on January 8, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced as an Appendix, *infra*, 1a-2a.

STATEMENT

This case involves a challenge by the Governor of Minnesota to the constitutionality of the Montgomery Amendment, 10 U.S.C. 672(f). Passed in 1986, that Amendment provides that when members of the National Guard of the United States are ordered to active duty outside the United States, the governor of a State may not withhold his or her consent to such duty based upon the governor's objections to its location, purpose, type or schedule. In passing the measure, Congress relied on the broad powers conferred on it by the Constitution to provide for the Nation's defense and security.

1. The United States Constitution contains a number of provisions conferring authority on Congress to "provide for the common defence" of the nation. U.S. Const. Preamble. Section 8 of Article I grants Congress power "[t]o raise and support Armies" (Cl. 12). Section 8 of Article I also includes provisions giving Congress power "[t]o provide and maintain a Navy" (Cl. 13), "[t]o make Rules for the Government and Regulation of the land and naval Forces" (Cl. 14), and to collect taxes to "provide for the common Defence" (Cl. 1). Other provisions indicate that the power of the federal government in matters of national defense is plenary. Section 10 of Article I provides that "[n]o State shall, without the Consent of Congress, * * * keep Troops, or Ships of War in time of Peace, * * * or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay" (Cl. 3). Article II provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States" (§ 2, Cl. 1). Finally, a number of provisions grant exclusive power to the federal government over the closely related areas of war and foreign relations.[1]

[1] See Art. I, § 8, Cl. 11 (Congress's power to declare war); Art. I, § 10, Cl. 1 (States forbidden to enter into treaties); Art. I, § 10, Cl. 3 (States forbidden to enter into agreements with foreign powers); Art. II, § 3, Cl. 3 (President shall receive ambassadors).

In two neighboring clauses in Section 8 of Article I, the Constitution also grants Congress extensive power over "the Militia," while reserving other authority to the States. The first of these clauses – Clause 15 – gives Congress the power to "provide for calling forth the Militia" for three specific purposes: "to execute the Laws of the Union, suppress Insurrections and repel Invasions[.]" U.S. Const. Art. 1, § 8, Cl. 15. The second clause – Clause 16 – grants Congress the power

> [t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.]

U.S. Const. Art. 1, § 8, Cl. 16.

Aside from the Militia Clauses, the militia are mentioned in the original Constitution only once: Article II provides that "[t]he President shall be Commander in Chief * * * of the Militia of the several States, when called into the actual Service of the United States." Art. II, § 2, Cl. 1. The Second Amendment also mentions the militia, providing that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

2. a. Congress has exercised its extensive constitutional powers over matters of national defense by establishing the armed forces of the United States, which consist of the Army, Navy, Air Force, Marine Corps, and Coast Guard. 10 U.S.C. 101(4); 32 U.S.C. 101(2). Each of these services has a reserve component, 10 U.S.C. 261, the purpose of which is to provide trained military units to supplement the armed forces "in time of war or national emergency and at such other times as the national security requires." 10 U.S.C. 262.

The reserve components of the Army are the Army National Guard of the United States, 10 U.S.C. 261(a)(1), and the Army Reserve, 10 U.S.C. 261(a)(2). The reserve components of the Air Force are the Air National Guard of the United States, 10

U.S.C. 261(a)(5), and the Air Force Reserve, 10 U.S.C. 261(a)(6).[2] The Army and Air National Guard of the United States (collectively "NGUS") are in the "Ready Reserve," 10 U.S.C. 269(b)—the units whose availability for active duty are most relied upon. 10 U.S.C. 268(a), 672, 673.

The Army NGUS is defined by statute as "the reserve component[s] of the Army all of whose members are members of the Army National Guard." 10 U.S.C. 101(11); 32 U.S.C. 101(5). See also 10 U.S.C. 101(13); 32 U.S.C. 101(7) (same definition for Air NGUS). To become a member of the NGUS, a person must enlist in, and be federally recognized as a member of, the National Guard of a particular state. 10 U.S.C. 591(a), 3261, 8261.[3] Under this "dual enlistment" system established in 1933 (which we shall presently describe in fuller detail), Guardsmen, when not on active duty in the NGUS, are administered as members of their respective state National Guard units. 10 U.S.C. 3079, 8079. When on active duty as NGUS members, however, Guardsmen are relieved of duty in their state National Guard units. 32 U.S.C. 325.

As a reserve component of the armed forces, the NGUS is ordinarily not on active duty. However, the NGUS may be ordered to active duty by federal authorities in a variety of circumstances. Congress, for example, may order the NGUS to active duty and "retain[ ] [it] as long as so needed" whenever Congress determines that "more units * * * are needed for the national security than are in the regular components of the ground and air forces." 10 U.S.C. 263. There is no restriction as to the purpose for which such units may be used.

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[2] The status of the Naval Reserve, see 10 U.S.C. 261(a)(3), which is not a part of the NGUS/National Guard system, is not at issue in this case.

[3] An individual enlisting in the National Guard also enlists in the NGUS, see 32 U.S.C. 301. However, because no statute requires that all members of the National Guard be members of the NGUS as well, there may be rare instances in which an individual's membership in the NGUS is terminated, while his membership in the state National Guard is not. See *Zitser* v. *Walsh*, 352 F. Supp. 438, 440 (D. Conn. 1972).

Executive Branch officials may also order reserve forces to active duty under a number of circumstances. 10 U.S.C. 672-675. In times of war or national emergency, the appropriate official may order any member of a reserve component into active duty for any purpose other than training. 10 U.S.C. 672(a). When the President determines "that it is necessary to augment the active forces for any operational mission," the appropriate Executive Branch officials may order up to 200,000 members of the reserve to active duty for a period of not more than 90 days, subject to certain restrictions as to use and certain reporting requirements. 10 U.S.C. 673b. In the event of "national emergency declared by the President" or in some other circumstances, the appropriate official may order up to 1,000,000 reservists to active duty, again subject to certain restrictions as to use and certain reporting requirements. 10 U.S.C. 673.

b. At issue in this case are two further provisions for ordering reservists to active duty. Pursuant to 10 U.S.C. 672(b), the appropriate official may order any reservist to active duty for up to fifteen days for any purpose. Pursuant to 10 U.S.C. 672(d), the appropriate official may order any consenting reservist to active duty indefinitely for any purpose. These two provisions are the only provisions for activating reserve forces that distinguish in any way between the NGUS and other reserve components. They provide that an NGUS unit or member, unlike members or units of other reserve components, may not be ordered into active duty "without the consent of the governor of the State" in which the unit or member is located. Pursuant to the provision at issue in this case—the Montgomery Amendment, 10 U.S.C. 672(f)—such consent "may not be withheld (in whole or in part) with regard to active duty outside the United States * * * because of any objection to the location, purpose, type, or schedule of such active duty."

c. The NGUS receives all of its funding from Congress, and forms an integral part of the total armed forces of the United States. See Pet. App. A116. In 1986, the Army NGUS provided 46% of the Army's combat units and 28% of its support forces. In the event of full mobilization, 18 of the 28 Army divisions would be provided wholly or in part by the Army NGUS. For its

part, the Air NGUS operates and maintains more than 1,700 aircraft. In fiscal year 1987, it provided, *inter alia*, 73% of the Nation's air defense interceptor forces, 52% of tactical air reconnaissance, 34% of tactical airlift, 25% of tactical fighters, 17% of aerial refueling, and 24% of tactical air support forces. J.A. 12-13. NGUS personnel participated in the Grenada mission and the air strike on Libya. Pet. App. A120-A121 n.41. They also played a vital role in the recent operation in Panama.

3. As currently defined, the militia of the United States includes all able-bodied males between the ages of 17 and 45, with some exceptions, see 10 U.S.C. 312, who are, or have declared the intention of becoming, citizens of the United States, as well as all female citizens who are commissioned officers of the National Guard. 10 U.S.C. 311(a). The President may call the militia of any State into federal service when civil unrest in that State is such that it has become "impracticable to enforce the laws of the United States * * * by the ordinary course of judicial proceedings," 10 U.S.C. 332, or when there is an insurrection in another State against its government, 10 U.S.C. 331. See note 17, *infra*.

The militia is divided into two classes: the organized militia, which consists of the National Guard and the Naval Militia, and the unorganized militia, which includes all other members of the militia. 10 U.S.C. 311(b). The Army and Air National Guard (collectively the "National Guard") are defined separately from the Army and Air NGUS (reserve components of the Army and Air Force). The Army and Air National Guard are "that part of the organized militia of the several States * * * that:

> (A) is a land [air] force;
>
> (B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;
>
> (C) is organized, armed and equipped wholly or partly at Federal expense; and
>
> (D) is federally recognized."

10 U.S.C. 101(10) and (13); 32 U.S.C. 101(4) and (6). Although States are not required to maintain National Guard units, every State, in addition to the District of Columbia, Puerto Rico, and certain territories, has a National Guard.

Aside from the statutes cited above permitting the President to call "the militia" into federal service, Congress has enacted legislation specifically exercising the federal government's authority over the state National Guard. The President may call the National Guard into federal service for the three purposes listed in the Militia Clauses: to repel a foreign invasion, suppress a rebellion against the authority of the United States, or to enforce the laws of the United States. 10 U.S.C. 3500, 8500.[4] When the National Guard is called into federal service, the orders "shall be issued through the governors of the States." 10 U.S.C. 3500.

Congress has also exercised its constitutionally granted authority to organize, arm, and discipline the National Guard. In general, the organization and composition of the National Guard is required to be the same as that prescribed for the Army and Air Force. 32 U.S.C. 104(b). Congress has also set forth eligibility criteria for membership in the National Guard, see 32 U.S.C. 313, and has required those who qualify for service to take an oath to support and defend the Constitutions of the United States and their own State and to obey orders of the President and their respective governors. 32 U.S.C. 304, 312. In addition, Congress requires each National Guard unit to assemble for drill instruction at least 48 times per year and to participate in annual, 15-day training camps. 32 U.S.C. 502.

Congress also provides the bulk of the funding for the National Guard. 32 U.S.C. 107. The Department of Defense currently pays more than 90% of the National Guard's expenses. J.A. 13. The President, however, may deny federal funding to any State whose National Guard does not comply with federal rules and regulations. 32 U.S.C. 108.

4. In addition to its National Guard, a State may organize and maintain a separate state defense force. 32 U.S.C. 109(c). A state defense force may be used as the State's chief executive sees fit, but may not, by statute, be called or drafted into the

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[4] The authority to call the National Guard into federal service pursuant to 10 U.S.C. 3500, 8500, overlaps substantially with the authority to call the militia into federal service pursuant to 10 U.S.C. 331-333.

armed forces of the United States. 32 U.S.C. 109(c). Currently at least 30 States have enacted statutes providing for the organization of such defense forces.[5] We are informed that at least 10,000 individuals are currently enrolled in such organizations.[6]

5. This case concerns NGUS units ordered to active duty under 10 U.S.C. 672(b) and (d). Both of those provisions generally require the consent of the governor of the State in which the NGUS units are located. See App. *infra*, 1a-2a. In 1985 and 1986, several governors, including Governor Perpich, expressed opposition to the Administration's Central American policy and either withheld their consent to NGUS training missions in that region or indicated that they would do so. J.A. 24-26. In response, Congress in 1986 enacted the Montgomery

[5] Twenty-four States have statutes providing for a state defense force or a state guard that is separate from the National Guard: Alabama, Ala. Code § 31-2-8 (1975); Alaska, Alaska Stat. § 26.05.100 (1962); California, Cal. Mil. & Vet. Code § 120 (West 1988); Georgia, Ga. Code Ann. § 38-2-3(a)(3) (1982 & Supp. 1989); Indiana, Ind. Code § 10-2-8-1 (1988); Louisiana, La. Rev. Stat. Ann. § 29:5 (West 1989); Maryland, Md. State Guard Code Ann. art. 65, § 62 (1983); Massachusetts, Mass. Ann. Laws ch. 33, § 10 (Law. Co-op. 1983); Michigan, Mich. Comp. Laws Ann. § 32.651 (West 1985 & Supp. 1989); Mississippi, Miss. Code Ann. § 33-5-51 (1972 & Supp. 1989); Montana, Mont. Code Ann. § 10-2-701 (1988); Nebraska, Neb. Rev. Stat. § 55-201 (1988); New Mexico, N.M. Stat. Ann. § 20-5-1 (1989); New York, N.Y. Military Law § 165 (McKinney 1953 & Supp. 1990); Ohio, Ohio Rev. Code Ann. § 5920.01 (Anderson 1977 & Supp. 1988); Oregon, 1989 Or. Laws 361 (amending Or. Rev. Stat. Ann. § 396.105 (1987)); Rhode Island, R.I. Gen. Laws § 30-5-5 (1982); South Carolina, S.C. Code Ann. § 25-3-10 (Law. Co-op. 1977); Tennessee, Tenn. Code Ann. § 58-1-402 (1980); Texas, Tex. Gov't Code Ann. § 231.051 (Vernon 1988); Utah, Utah Code Ann. § 39-4-1 (1988); Vermont, Vt. Stat. Ann. tit. 20, § 1151 (1987); Virginia, Va. Code Ann. § 44-1 (1986 & Supp. 1989), Washington, Wash. Rev. Code § 38.16.040 (1964). Governors from at least six other states have the statutory authority to create a state defense force: Colorado, Colo. Rev. Stat. § 28-4-104 (1989); Delaware, Del. Code Ann. tit. 20 § 301 (1985); Hawaii, Haw. Rev. Stat. § 122A-2 (1988); Kentucky, Ky. Rev. Stat. Ann. § 37.170 (Michie 1985); New Jersey, N.J. Rev. Stat. Ann. § 38A:9-1 (1968); Wyoming, Wyo. Stat. § 19-3-101 (1977). Minnesota law appears to recognize a "state guard," in addition to the National Guard. See Minn. Stat. Ann. §§ 190.06, 191.09 (West 1962 & Supp. 1990).

[6] Cf. Preparedness Training in Va., Wash. Post, Aug. 9, 1987, at B1, B10.

Amendment. 10 U.S.C. 672(f); see 132 Cong. Rec. 21,660-21,663 (1986).[7] That Amendment provides:

> The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

The Montgomery Amendment did not, however, eliminate the consent provisions altogether. A governor may still withhold his consent based upon other grounds, for example, that the state National Guard is needed to deal with a local emergency. See H.R. Conf. Rep. No. 1001, 99th Cong., 2d Sess. 475 (1986); 132 Cong. Rec. 21,633 (1986) (remarks of Rep. Montgomery).

Petitioners, the State of Minnesota and its governor, Rudy Perpich, commenced this action after the Secretary of Defense ordered members of an NGUS unit from Minnesota to active duty pursuant to 10 U.S.C. 672(b) or (d) for three missions in Central America. J.A. 6. Governor Perpich asserted that he would have objected to one of those orders had it not been for the limitations imposed by the Montgomery Amendment on his power to veto the federal government's decision to order an NGUS unit from his State into active duty. *Ibid.* Such limitations were unconstitutional, Governor Perpich claimed, because they violated Art. I, § 8, Cl. 16 of the Constitution, which "reserv[es] to the States * * * the Authority of training the Militia according to the discipline prescribed by Congress." Petitioners sought a declaratory judgment that the Montgomery Amendment was void and injunctive relief barring the United States from ordering any NGUS unit from Minnesota to active duty for training abroad without Governor Perpich's consent. J.A. 7.

[7] Congress enacted the Montgomery Amendment three times with identical language. It was first enacted on October 18, 1986, as part of the fiscal 1987 continuing appropriations resolution. H.R.J. Res. 738, Pub. L. No. 99-500, § 9122, 100 Stat. 1783-127. It was then included in the corrected version of that resolution enacted on October 30, 1986. Pub. L. No. 99-591, § 9122, 100 Stat. 3341-127. Finally, it was enacted on November 14, 1986, as part of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-961, § 522, 100 Stat. 3871.

6. The district court granted summary judgment for the United States. Pet. App. A141-A153. In sustaining the constitutionality of the Montgomery Amendment, the court first noted that "[a]ll authority to provide for the national defense resides in Congress, and state governors have never had, and never could have jurisdiction in this area." Pet. App. A149. Accordingly, the court found that "the dual enlistment system, under which National Guard members serve as members of both a state national guard and of the National Guard of the United States, is a valid exercise of Congressional power under the Army and Necessary and Proper clauses." Pet. App. A149-A150.

Relying on the *Selective Draft Law Cases*, 245 U.S. 366 (1918), the district court reasoned that "[b]ecause Congress' authority to provide for the National defense is plenary, the Militia clause • • • cannot constrain Congress' authority to train the Guard as it sees fit when the Guard is called to active federal service." Pet. App. A150. The court found that the gubernatorial consent provisions in 10 U.S.C. 672(b) and (d), which the Montgomery Amendment restricted, were "not constitutionally required," but were rather "an accommodation to the states" that "Congress may withdraw • • • without violating the Constitution." Pet. App. A150.

7. A divided panel of the court of appeals reversed. Pet. App. A63-A141. The panel majority (Judge Heaney and Senior Judge Fairchild, sitting by designation) held that the Montgomery Amendment "contravenes the intent of the Framers" and "violates the plain language of the Constitution." Pet. App. A66. The panel also ruled that the Montgomery Amendment is at odds with this Court's decisions in the *Selective Draft Law Cases, supra*, and *Cox* v. *Wood*, 247 U.S. 3 (1918). The panel interpreted those decisions to establish that "the army power could supersede reserved state authority over the militia only when Congress had determined that there was some sort of exigency or extraordinary need to exert federal power." Pet. App. A92. Judge Magill dissented. Pet. App. A123-A141.

8. Sitting en banc, the court of appeals granted rehearing, vacated the panel's decision, and affirmed the district court.

Pet. App. A1-A62.1. The en banc court described the basic issue as, "when the State claims a right to control Militia training, and Congress claims 'We're training the Army, not the Militia,' who wins?" Pet. App. A9. It resolved that question in favor of the federal government, noting that "[t]he authority given to Congress by the army clause is plenary and exclusive." *Ibid.* Like the district court, the court of appeals determined that the dual enlistment system and the authority conferred on federal officials to order NGUS units to active duty for training were valid exercises of Congress's power under the Army Clause. Pet. App. A9-A10. The Court held that the *Selective Draft Law Cases, supra*, and *Cox* v. *Wood, supra*, "made clear that the army clause is not limited by the militia clause." Pet. App. A11. The majority concluded:

> Congress' army power is plenary and exclusive. The reservation to the States of authority to train the Militia does not conflict with Congress' authority to raise armies for the common defense and to control the training of federal reserve forces. The Montgomery Amendment is a constitutional exercise of Congress' army powers.

Pet. App. A13.

Judges Heaney and McMillian dissented. They adhered to the views expressed in the panel opinion. Pet. App. A14-A62.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case challenges the constitutionality of the dual enlistment concept, the basis upon which major portions of the armed forces reserves of this Nation have been organized for more than fifty years. Acting in express reliance upon this Court's holdings in the *Selective Draft Law Cases*, 245 U.S. 366 (1918), and *Cox* v. *Wood*, 247 U.S. 3 (1918), Congress created two organizations—the National Guard of the United States (NGUS) and the state National Guard—that make use of the same individual members for complementary federal and state purposes. The question in this case is whether a cooperative arrangement of this nature, largely funded by the federal government, is constitutional.

The federal government relies on the federal element of the system—the NGUS—as an essential reserve component of this Nation's armed forces. Under the "Total Force" doctrine, which has governed national strategic defense planning since the early 1970's, the regular (or active duty) armed forces are intentionally maintained at smaller levels than would be necessary to assure our security. For virtually any important military mission, the national security depends upon the immediate availability of trained NGUS troops to supplement the regular forces.

For their part, State governments make use of the members of the NGUS in their status as members of the state National Guard where, by statute, they function as a component of the militia. In this status, the Guardsmen are available to their respective state governments to assist in a wide variety of situations, including civil disorder and natural disasters. In their status as members of the state National Guard, Guardsmen may be called into federal service only for the three purposes enumerated in the Militia Clauses—executing the laws of the union, repelling invasions, and suppressing insurrections. States need not maintain National Guard units. Given the substantial financial incentive provided by federal funding of the NGUS/National Guard system, however, all States have chosen to maintain National Guard units and thus to participate in the dual enlistment system.

Petitioners instituted this case seeking an injunction against use of the federal component of the dual enlistment system, the NGUS, for a purpose—training—that is alleged to exceed the federal government's authority under the Militia Clauses. Essentially, their claim is that, despite Congress's intent to create the NGUS as a federal military force outside the limitations of the Militia Clauses, Congress succeeded only in creating a militia organization under the primary control of the States.

This Court squarely rejected petitioners' theory seventy years ago in the *Selective Draft Law Cases* and *Cox* v. *Wood*. In those cases, the Court established unequivocally that Congress enjoys broad authority to raise a national army and that this power is

not limited in any way by the Militia Clauses. Even if creation of the NGUS could be seen to "narrow[ ] the area over which the militia clause operate[s]," *Selective Draft Law Cases*, 245 U.S. 366, 384 (1918), these cases squarely hold that Congress may achieve this result through exercise of its Army Clause powers.

If accepted at this late date, petitioners' theory would have severe consequences for the ability of our armed forces to meet the Nation's defense needs. Each of 50 state governors would have veto power over use of NGUS troops from his or her State outside the three purposes set forth in the Militia Clauses. Moreover, training of the NGUS, whether for these three purposes or for any other purpose, would be under exclusive control of the States.

Petitioners advance no persuasive reason to support their contention that the Constitution requires that the NGUS be treated as a "Militia" organization, rather than as a component of the national armed forces. Although it is true that all members of the NGUS are members of the corresponding state National Guard unit, this defining trait of the dual enlistment system provides substantial benefit to the States by providing them with an organized militia largely at federal expense. Inasmuch as no State is required to maintain a state National Guard, the system does not in any respect require the States to cede reserved powers to the federal government.

Nor does the system render the Militia Clauses devoid of application. The Militia Clauses remain fully applicable to the state National Guard. Under the current statutory scheme, the States are assured of the use of their National Guard units for any legitimate state purpose. They are simply forbidden to use their control over the state National Guard to thwart federal use of the NGUS for national security and foreign policy objectives with which they disagree.

The history of the framing and ratification of the Army and Militia Clauses confirms that Congress may use its broad Army Clause powers to organize and maintain the NGUS as a component of the national armed forces, outside the limitations of the Militia Clauses. While the Militia Clauses divide powers be-

tween the state and federal governments in a careful compromise between those who supported and those who opposed federal power over the militia, the federalists succeeded in securing for Congress virtually unrestricted powers to raise and employ the armed forces. There is no reason to believe that the Framers intended that state power over the militia was to be the sole exception to thei. decision to vest exclusive power in the federal government with respect to foreign affairs and the national security.

Recognizing that their argument entails the unacceptable conclusion that the NGUS may be used only to execute federal law, repel invasions, and suppress insurrections as provided by the Militia Clauses, petitioners advance a novel constitutional theory that the federal government may ignore the limitations on federal power in the Militia Clauses in the event of a "national exigency" declared by Congress or the President. This theory finds no support in the text or history of the relevant constitutional provisions. In essence, it amounts to a suggestion that, because the *Selective Draft Law Cases* arose during the "national exigency" of World War I, the holding and reasoning of those cases should be confined to situations in which such an "exigency" has been declared. This misguided suggestion is particularly inappropriate in light of Congress's express reliance on this Court's decisions in creating and employing the National Guard of the United States as an essential link in this country's armed forces.

ARGUMENT

THE MONTGOMERY AMENDMENT, WHICH LIMITS THE GROUNDS UPON WHICH A STATE GOVERNOR CAN OBJECT TO ACTIVE DUTY OVERSEAS OF UNITS OF THE NATIONAL GUARD OF THE UNITED STATES FROM HIS STATE, IS A PERMISSIBLE EXERCISE BY CONGRESS OF ITS PLENARY POWER UNDER THE ARMY CLAUSE AND DOES NOT VIOLATE THE MILITIA CLAUSES

A. *The Constitution Does Not Forbid The Federal Government And The States From Entering Into A Cooperative Arrangement Such As The Dual Enlistment System*

The issue in this case is whether the Constitution permits the federal government and the States to enter into a cooperative arrangement whereby the same individuals are enlisted as both NGUS troops – reserve members of the United States Army and Air Force constitutionally indistinguishable from any other members of the national armed forces – and state National Guard members – members of the "militia" in constitutional terms – over whom federal authority is constitutionally limited. We submit that the "dual enlistment" system, as currently embodied in federal statutes governing the NGUS and the National Guard, is scrupulously faithful to all relevant constitutional provisions. The system was adopted by Congress in express reliance on this Court's decisions in the *Selective Draft Law Cases*, 245 U.S. 366 (1918), and *Cox* v. *Wood*, 247 U.S. 3 (1918), holding that the Militia Clauses do not act as a limitation on Congress's plenary authority under the Army Clause. The dual enlistment system permits – but does not require – the States to utilize federally funded reserve troops as state militia, thus avoiding the costly burden of funding and maintaining entirely separate state militias. Far from oppressing the States or depriving them of a prerogative granted by the Constitution, the system is in the highest tradition of cooperative federalism and should be upheld.

1. Two types of military forces, both expressly recognized by the Constitution, are at issue. In Article I, Section 8, Clause 12, Congress is granted authority "[t]o raise and support

Armies." Petitioners do not dispute that, pursuant to authority granted by the Army Clause, Congress may provide for armies composed of any combination of volunteers and draftees, regular soldiers and reservists. See *Selective Draft Law Cases*, *supra*; *Cox* v. *Wood*, *supra*. Nor do petitioners dispute that armed forces raised pursuant to the Army Clause may constitutionally be employed by the federal government for virtually any purpose seen by Congress and the President to be in the national interest.

In contrast to the plenary power granted by the Army Clause, the Constitution defines carefully circumscribed zones of federal and state authority over the Militia, the other type of military force identified in the Constitution. Congress may call forth the militia only to "execute the Laws of the Union, suppress Insurrections and repel Invasions." Art. I, § 8, Cl. 15. Moreover, although Congress may "provide for organizing, arming, and disciplining" the militia, for "governing" them while in federal service, and for prescribing "discipline" for them while in training, Art. I, § 8, Cl. 16, the Constitution reserves to the States "the Appointment of the Officers, and the Authority of training" the militia. *Ibid.*

2. The statutes governing the NGUS demonstrate that it is a force over which the federal government exercises the plenary control that is a charactistic of bodies raised as "Armies" under the Army Clause.[8] The statutory scheme that has evolved constitutes the NGUS as a "reserve component" of the Army and Air Force, 10 U.S.C. 101(11), 101(13); 32 U.S.C. 101(5), 101(7), and thus the NGUS is part of the "armed forces" of the United States. 10 U.S.C. 101(4); 32 U.S.C. 101(2). With a single exception – the gubernatorial veto power of 10 U.S.C. 672(b) and (d), which is at issue in this case – the circumstances under

[8] Congress expressly stated its intent to create the NGUS as an Army Clause organization when it passed the legislation first establishing the dual enlistment system in 1933. See pp. 38-39, infra.

which the NGUS may be ordered to active duty, see 10 U.S.C. 672-675, are in no way different from those in which other reserve components of the armed forces, see 10 U.S.C. 261 *et seq.*, may be so ordered. Most significantly, the uses to which the NGUS may be put once in active duty are identical to the uses to which other reserve components may be put or, indeed, to the uses to which the armed forces may generally be put in protecting national security. In all these respects, the statutory scheme embodies Congress's determination that the NGUS must be generally available on the same basis as other components of the armed forces, pursuant to the Army Clause of the Constitution.

The federal statutes governing state National Guard units differ dramatically from the legal framework governing the NGUS. In each case, the difference demonstrates that the state National Guard is a Militia Clause, not an Army Clause, organization.[9] The state National Guard is defined as "that part of the organized militia" which, *inter alia*, has officers appointed pursuant to the Militia Clauses of the Constitution. 10 U.S.C. 101(10), 101(12); 32 U.S.C. 101(4), 101(6). The state National Guard may be called into federal service for the three purposes set forth in the Militia Clauses – executing federal law, suppressing insurrections, and repelling invasions. See, *e.g.*, 10 U.S.C. 331-333, 3500, 8500. In addition, much of Title 32 of the U.S. Code is concerned with the organization, arming, and discipline of the state National Guard – functions expressly vested in the federal government by the Militia Clauses.

3. Petitioners have no quarrel with the statutory scheme governing th state National Guard. As is evident from their Complaint, their sole contention is that the NGUS may not be "trained" by the federal government without their consent. See

[9] Just as Congress expressly stated its intent to create the NGUS as an Army Clause organization, it similarly was quite clear in stating its intent to organize the National Guard pursuant to its Militia Clause powers. See pp. 38-39, *infra*.

J.A. 7, ¶ 1. But if the NGUS is constitutionally an "Army," as it manifestly is, then petitioners have no more constitutional right to control its training overseas—or its use for any other purpose—than they would to control similar use of any other regular or reserve unit of the United States armed forces. In short, petitioners' argument hinges entirely on their contention that, although Congress created and funded the NGUS with the objective of creating a reserve "Army," Congress in fact succeeded only in creating a "Militia" organization subject to limited federal control as specified in the Militia Clauses.

This Court squarely repudiated the premise underlying petitioners' argument in the *Selective Draft Law Cases*, *supra*, and *Cox* v. *Wood*, *supra*. In the *Selective Draft Law Cases*, the Court rejected numerous challenges to the draft law of 1917, including the claim that persons could not be drafted into the Army except for the three purposes specified in the Militia Clauses. 245 U.S. at 381-382.[10] Four months later, in *Cox* v. *Wood*, 247 U.S. 3 (1918), it was argued that, "although Congress had the power to call the citizens of the United States, the

[10] The draft law at issue in the *Selective Draft Law Cases* and *Cox* v. *Wood* was enacted on May 18, 1917 (ch. 15, 40 Stat. 76), one month after Congress declared war in World War I. Act of Apr. 6, 1917, ch. 1, 40 Stat. 1, S. J. Res. 1, 65th Cong. 1st Sess.). Section 1 (Second) of the draft law (40 Stat. 76) expressly authorized the President "[t]o draft into the military service of the United States * * * any or all members of the National Guard" to "serve therein for the period of the existing emergency unless sooner discharged." Section 1 (Third and Fourth) also authorized the drafting of 1,000,000 men other than National Guardsmen. 40 Stat. 76-77. All draftees were to serve "for the period of the war, unless sooner terminated by discharge or otherwise." Act of June 15, 1917, ch. 29, § 4, 40 Stat. 217.

The 1917 draft depended upon the mechanism for drafting National Guard members created by statute the previous year. The National Defense Act, ch. 134, 39 Stat. 166, had provided for drafting into federal service of individual members of the National Guard at any future time "[w]hen Congress shall have authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those of the Regular Army * * * to serve therein for the period of the war unless sooner discharged." § 111, 39 Stat. 211.

national militia, to compulsory service in virtue of the militia clause of the Constitution (Article I, § 8)," that power was limited to use for the three purposes specified in the Militia Clauses. 247 U.S. at 4. Holding that this argument rested upon a "fundamental mistake" (*id.* at 5), the Court reaffirmed its holding in the *Selective Draft Law Cases*.[11]

The Court's decisions in the *Selective Draft Law Cases* and *Cox* v. *Wood* established unequivocally that Congress has plenary authority to raise a national army, not limited by provisions of the Militia Clauses. In the *Selective Draft Law Cases*, the Court noted that, under the Articles of Confederation, the power to raise armies was divided between Congress and the States; Congress had the right to call on the States to provide forces and the States had the duty to comply. 245 U.S. at 382. The Constitution, however, united the two parts of this power and vested it in Congress. When this occurred, "all governmental power on the subject was conferred." *Ibid.* The result was that "[t]he army sphere therefore embraces such complete authority." This holding was reaffirmed in *Cox* v. *Wood*, 247 U.S. at 6.[12]

[11] Petitioners correctly state (Pet. Br. 33-34) that the *Selective Draft Law Cases* did not involve challenges by members of the organized militia or National Guard. See Brief for the United States at 52, 60, *Selective Draft Law Cases*, 245 U.S. 366 (1918). Nor did *Cox* v. *Wood*. The point is irrelevant, however, because those cases did involve members of the *unorganized* militia, and the Militia Clauses make no distinction between the two classes of the militia. The power to draft into the Army members of the organized militia—who then as now consisted of members of the state National Guard—was upheld in *Ex parte Dorstal*, 243 F. 664 (N.D. Ohio 1917).

[12] In numerous other cases, this Court has established that Congress enjoys plenary authority under the Army Clause to provide for the national defense. *E.g.*, *Rostker* v. *Goldberg*, 453 U.S. 57, 65 (1981); *Schlesinger* v. *Ballard*, 419 U.S. 498, 510 (1975); *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968); *Tarble's Case*, 80 U.S. (13 Wall.) 397, 408 (1871); *Houston* v. *Moore*, 18 U.S. (5 Wheat.) 1 (1820). Moreover the Necessary and Proper Clause (U.S. Const. Art. I, § 8, Cl. 18) grants Congress broad power to select any means to achieve the ends within the scope of the enumerated powers under Article I of the Constitution. *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Taken

This holding alone is dispositive in this case. The NGUS, like the regular army whose composition was at issue in the *Selective Draft Law Cases*, is defined and treated as a component of the national army; in consequence, Congress has plenary power to train, organize, and utilize it. To be sure, the NGUS is a reserve component composed of volunteers, whereas the force being raised in the *Selective Draft Law Cases* was a regular army composed of conscripts. Those differences, however, do not alter the result. If anything, because conscription of members of the militia into a standing army is a far greater intrusion on state autonomy than a provision for voluntary enlistment into a reserve force, the result in this case follows *a fortiori*.

Moreover, the Court's opinion in the *Selective Draft Law Cases* addressed the specific argument advanced by petitioners here – that the Militia Clauses must prevail when their specific limitations upon federal power clash with Congress's exercise of its broad powers under the Army Clause. See Pet. Br. 11-13.[13] Indeed, the Court repeatedly explained that, although the Militia Clauses left control over the militia in the hands of the States in the absence of congressional action to the contrary, this "did not diminish the military power," but simply left "an area of authority" to the States "unless and until by the exertion of the military power of Congress that area had been circumscribed or totally disappeared." 245 U.S. at 383.[14] In *Cox* v.

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together, these two Clauses compel the conclusion that Congress's authority to provide for the national defense is plenary and unlimited by the Militia Clauses.

[13] Indeed, the lead plaintiff in the *Selective Draft Law Cases*, like petitioners here, expressly relied upon the power reserved to the States to train the militia. He argued that, under the draft law, the plaintiffs "would be taken from the unorganized militia and forced to serve in the regular army in violation of the provisions * * * reserv[ing] to the States the authority of training the militia and the appointment of officers." Brief of Plaintiff in Error at 16, *Arver* v. *United States (Selective Draft Law Cases)*, 245 U.S. 366 (1918).

[14] See also 245 U.S. at 382 (States retain control over the militia "to the extent that such control was not taken away by the exercise by Congress of its power to raise armies."); *id.* at 384 (referring to fact that "power granted to Congress to raise armies * * * was susceptible of narrowing the area over which the militia clause operated"). The Court also observed that the fact that Congress had provided for calling the militia into federal service under the

Wood, the Court added the coda to this exposition: the powers of Congress to raise an army "were not qualified or restricted by the provisions of the militia clause." 247 U.S. at 6.

The Court's reasoning is directly applicable in this case. As explained above, petitioner's argument is that the NGUS, understood by Congress to be an Army Clause organization, must be classified for purposes of constitutional analysis as a "Militia" organization. That contention flies in the face of Congressional intent. Congress expressly created the NGUS as "a reserve component of the Army," 10 U.S.C. 101(13); 32 U.S.C. 101(5). What is more, the Article I branch carefully structured the Nation's armed forces upon the understanding that the NGUS would be available for any military purpose. Petitioners nonetheless assert that the specific commands of the Militia Clauses dictate that Congress cannot so structure the armed forces. The Court's reasoning in the *Selective Draft Law Cases* – founded in the text of the Constitution – provides the answer to this assertion.

4. If accepted, petitioner's argument would have serious consequences for the Nation's defense policy. The Nation relies on the NGUS for 46% of its combat units and 28% of its support forces. The Air Force is even more dependent on the NGUS, relying on NGUS units for 73% of its air defense interceptor forces, 52% of its tactical air reconnaissance capability, 34% of its tactical air lift capacity, and a substantial portion of its other duties. See J.A. 12-13.

If, as petitioner would have it, NGUS units were fully subject to the Militia Clauses, these forces could be trained only as authorized by each of the fifty state governors – each with his or her own vision of sound foreign and defense policy. Equally important, NGUS units could be put into service only for the three purposes enumerated in the Militia Clauses – executing federal law, repelling invasion, and suppressing insurrections. Although the scope of these three phrases has never been judicially construed, an attempt to employ the NGUS in a way

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Militia Clauses without exerting its Army Clause power does not lead to the conclusion "that the latter power when exerted was not complete to the extent of its exertion and dominant." *Id.* at 383.

arguably not included within these purposes—for example, the recent operation in Panama, the 1986 raid on Libya, the 1983 operation in Grenada, or even the Vietnam conflict, the Korean conflict, or World War II[15]—could lead to litigation at a time when the Nation could least afford it.[16] Even if litigation could be avoided, see *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19 (1827), the constitutional bar—even if not judicially enforceable—would remain.[17]

[15] NGUS troops were used in each of these operations. See Pet. App. A59-A60 (Libya and Grenada); J. Mahon, *History of the Militia and the National Guard* 184-197 (World War II), 208-210 (Korea), 242-243 (Vietnam) (1983).

[16] Indeed, there is precedent in our history for a refusal by militiamen to undertake a mission outside the United States, on the ground that it did not fall within the three purposes specified in Clause 15. In the War of 1812, New York militia units refused to cross into Canada to fight British soldiers there on the ground that to do so could not be "to repel an invasion." See *Selective Draft Law Cases*, 245 U.S. 366, 384-385 (1918); Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 189 (1940). It was feared for similar reasons that the militia could not be used in the Mexican-American War and the Spanish-American War. See *id.* at 190, 192. See also 29 Op. Att'y Gen. 322 (1912) (discussing extent to which militia might be available for use on foreign soil). The very purpose of creating the NGUS was to make available a reserve force that, as a component of the federal armed forces, would not be subject to these constraints. See pp. 38-39, *infra*.

[17] Petitioners' argument would have implications beyond the international arena. In September 1957, Governor Faubus of Arkansas called state National Guardsmen to active duty to oppose orders of a federal district court requiring the desegregation of Central High School in Little Rock. By virtue of the serious threat to national order, President Eisenhower in turn ordered "into the active military service of the United States • • • units of the National Guard of the United States and of the Air National Guard of the United States within the State of Arkansas" to enforce the federal court order. Exec. Order No. 10,730, 3 C.F.R. 389, 390 (1954-1958 Comp.). The NGUS units remained on duty for the balance of the school year. See generally *Cooper* v. *Aaron*, 358 U.S. 1, 9-12 (1958).

President Eisenhower's order was specifically addressed to the NGUS, not to the state National Guard units. The order cited 10 U.S.C. 332-334, provisions under which either "the militia" or "the armed forces" could be utilized to execute federal law. Had the President "called" the National Guard—the state militia—into federal service, Governor Faubus, who was largely responsible for the defiance of federal law, would have remained in the chain of

5. Ultimately, petitioners' argument represents a challenge to state as well as federal authority. Although every State has chosen to organize a National Guard unit under the dual enlistment system, no federal statute requires the States to do so. See 32 U.S.C. 109(c) (referring to state National Guard "if any"). Yet each State has independently concluded that the advantages of this cooperative dual system—in terms of federal funding and training—far outweigh the slightly reduced availability of its organized militia entailed by the need to permit the members of its National Guard to perform their federal obligations as members of the NGUS. If the NGUS is constitutionally a "Militia" organization despite Congress's best efforts to organize and constitute it as a reserve "Army," then the decisions of each State to accommodate the federal interest would be rendered wholly ineffective. Regardless of the State's intent, the State's participation in a federal-state partnership structured along the lines of the NGUS/National Guard system would inevitably, according to petitioners, render the NGUS a constitutional "Militia" organization.[18] Because of the constitutional

command and could have used his position to thwart the efforts to vindicate the court's desegregation orders. See 10 U.S.C. 3500, 8500 (orders to call National Guard into federal service "shall be issued through the governors of the States"). Because, however, the NGUS was available as a component of the armed forces, over which Governor Faubus could exercise no control, the President chose instead to order the NGUS into active service to meet the emergency. See J. Mahon, *History of the Militia and the National Guard* 224-226 (1983).

[18] Indeed, neither petitioners, amici States, nor the dissenting opinion in the court of appeals make clear the precise limits to Congressional power under the Militia Clauses. Presumably, all would agree that the national armed forces may constitutionally maintain reserve forces, aside from the NGUS, that are not subject to the Militia Clauses. See 10 U.S.C. 261. Yet, it is difficult to see why, if Congress may maintain a reserve force at all, Congress cannot (1) give state governors a voice in selection of officers for such reserve forces, (2) permit state governors to employ such reserve forces for legitimate state functions, and (3) permit state governors to have a limited veto power over the federal use of such reserve forces if they are needed for legitimate state purposes. Since the NGUS is simply a reserve force with all of these

limitations on the use of such an organization, the future of what has been a generally successful form of cooperative federalism would be called into doubt.

B. *None Of The Reasons Advanced For Creating A Rule That The NGUS Is A Militia For Constitutional Purposes Are Persuasive*

In light of the decisions in the *Selective Draft Law Cases* and *Cox* v. *Wood*, it is not surprising that petitioners' specific contention—that the NGUS must be governed by the Militia Clauses, rather than the Army Clause—has been rejected by every court to which it has been presented, including the district court and the en banc court of appeals in this case. See *Johnson* v. *Powell*, 414 F.2d 1060 (5th Cir. 1969); *Dukakis* v. *United States Dep't of Defense*, 686 F. Supp. 30 (D. Mass.), aff'd, 859 F.2d 1066 (1st Cir. 1988), cert. denied, 109 S. Ct. 1743 (1989); *Drifka* v. *Brainard*, 294 F. Supp. 425 (W.D. Wash. 1968).[19] Although petitioners and their supporting amici advance a number of reasons why, in their view, the unanimous judgment of these courts is mistaken, none of those arguments are persuasive.

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features, petitioners must identify which features convert what otherwise would be a reserve branch of the national armed forces into a militia governed by the Militia Clause. They have failed to do so.

[19] Petitioners (Pet. Br. 8 n.1, 23) cite this Court's statement in *Maryland* v. *United States*, 381 U.S. 41, vacated and modified on other grounds, 382 U.S. 159 (1965), that "[t]he *National Guard* is the modern Militia reserved to the States" by the Militia Clauses. 381 U.S. at 46 (emphasis added). Because *Maryland* involved state National Guard units—not NGUS units—the Court's statement is correct but of no relevance to the constitutional status of the NGUS, the sole issue in this case. In any event, the only issue in *Maryland* was whether, at a time when a state National Guard unit had not been called into federal service, a Guard officer who also served as a caretaker of the unit's federally provided equipment was an "employee" of the federal government for purposes of the Federal Tort Claims Act. The Court held that he was not. The case did not turn on any issue of constitutional interpretation, and the Court did not purport to decide any such question.

Petitioners also cite several military court decisions that suggest that the gubernatorial consent requirements of 10 U.S.C. 672 have constitutional underpinnings in the Militia Clause. *United States* v. *Self*, 13 M.J. 132, 135 (C.M.A. 1982); *United States* v. *Peel*, 4 M.J. 28, 29 (C.M.A. 1977); *United States* v. *Hudson*, 5 M.J. 413, 418 (C.M.A. 1978). See Pet. Br. 29 n.20. The constitutional source of authority for the NGUS was not at issue in any of

1. Petitioners argue that the Constitution requires the NGUS to be treated as a "Militia" organization because the NGUS "does not exist apart from the state National Guards" and does not have "separate membership" from the state Guard. Pet. Br. 37 n.26. Both of these statements, although accurate in the main, are irrelevant. Although the NGUS and National Guard have common membership, the fact that both units share the same members is nothing more than a defining feature of the dual enlistment system. It is not a reason for requiring that both organizations be deemed to be "militias" subject to the Militia Clauses.

The NGUS is defined by statute as a "reserve component of the Army [or Air Force] all of whose members are members of the Army [or Air Force] National Guard." 10 U.S.C. 101(11), 101(13); 32 U.S.C. 101(5), 101(7). Under this definition, a State that chose not to maintain a National Guard would thereby preclude formation of an NGUS unit in that State. Similarly, the definition makes clear that all members of the NGUS are also members of the state National Guard.

The principal significance of these provisions is not that the NGUS must be regarded as subject to the Militia Clauses, but simply that Congress has permitted the States to "piggyback" on the federally funded NGUS units at virtually no cost to themselves. Far from being an argument for state control of the NGUS, the common membership of the two organizations distinguishes the current system from a system in which the NGUS and National Guard would have distinct memberships and in which the States would be required to maintain the National Guard units at the States' own expense. The membership overlap between the NGUS and the National Guard represents

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those cases, and the statements cited were unaccompanied by even a cursory analysis of the constitutional authority for the NGUS under the Army or Militia Clauses. The issue in each case related to whether accused Guardsmen had properly been on active duty in the NGUS when military authorities attempted to assert court-martial jurisdiction, and the holdings of those cases have been legislatively overruled by 10 U.S.C. 802(d). Because the cases turned on applicable statutes and regulations, the brief statements in the opinions suggesting that the States' consent to the Guardsmen's federal service was constitutionally necessary were at best dicta.

an obvious—indeed central—benefit to the States flowing from the dual enlistment system. But membership overlap provides no basis for refusing to recognize federal control over the NGUS.

2. Amici States appear to argue that the dual enlistment system is tantamount to a system in which "the federal government can force state officers and employees to have federal status, and then use the federal status to avoid express constitutional limits on federal authority." Br. of Amici States 35. The factual premises of this argument are mistaken.

First, because the NGUS/National Guard system is voluntary, not mandatory, no State is required to cede any officer or employee to the federal government. Members of the state National Guard are members of the federal NGUS not because of any coercion on the part of the federal government, but because the state government has decided that the manifest benefits of the system justify cooperation with federal authorities. Cf. *South Dakota* v. *Dole*, 483 U.S. 203 (1987).

Second, amici's description of the dual enlistment system as one in which the federal government co-opts state employees is particularly inapt. All the costs of the NGUS and virtually all costs of the various state National Guards are paid by the federal government. J.A. 13.[20] Thus, although the system is based on federal-state cooperation, it could more accurately be characterized as making *federal* employees available at no charge to the *States*. No constitutional problem is posed by this type of cooperative federalism.

3. Finally, petitioners argue that the court of appeals' decision "emptied the militia training clause of any significant meaning." Pet. Br. 10; see also Brief of Amici States at 42. Under the current statutory scheme, however, the States retain their ability to maintain, use, and train their militia organizations—as well as other state defense forces, if they so choose—

[20] From 1981 through 1987, Congress provided nearly $47 billion for manning, equipping, and training the National Guard and the NGUS. J.A. 14. For fiscal year 1990, Congress has authorized over $8 billion to support these forces. Department of Defense Authorizations Act, 1990, Pub. L. No. 101-165, 103 Stat. 1112.

even if, pursuant to the statutes at issue here, 10 U.S.C. 672(b) and (d), the federal government seeks to employ the same individuals in their NGUS status.[21]

Under the dual enlistment system, the Militia Clauses continue to limit federal control over the state National Guard. The *only* restriction on the State's ability to make use of the state National Guard is the obvious one—that the state Guard becomes unavailable for state service when the individuals in the state units are activated as NGUS troops. See 32 U.S.C. 325. But this restriction is without constitutional significance. It results not from an improper extension of federal power over the militia, but from the State's decision to participate in the NGUS/National Guard system.

In any event, federal use of the NGUS has virtually no impact on a State's ability to use its National Guard. Although the Montgomery Amendment removes the power of a state governor to veto use of NGUS troops from his or her State pursuant to 10 U.S.C. 672 on the basis of the "location, purpose, type, or schedule" of such use, the Amendment does not withdraw the gubernatorial veto power altogether. A governor may still withhold his consent to activation of NGUS troops from his State "if he or she thinks the guardsmen are needed at home for local

[21] Where, as here, the Constitution provides two alternative sources of federal power, no rule of harmonious construction requires that the limitations of one source be transposed to the other. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), which upheld the public accommodations provisions of the Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*, illustrates the point. The *Civil Rights Cases*, 109 U.S. 3 (1883), had held that state action was a necessary element of a violation of the Fourteenth Amendment. In 1964, Congress sought to outlaw racial discrimination in privately owned public accommodations. The Court stated in *Heart of Atlanta* that "Congress based the Act on § 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce under Art. I. § 8, Cl. 3 of the Constitution." 379 U.S. at 249. The Court then upheld the Act under the Commerce Clause without reaching the Fourteenth Amendment question. 379 U.S. at 250. Thus, because Congress had power to reach private discriminatory action under one constitutional provision (the Commerce Clause), the Court did not have to consider whether Congress had exceeded its power under a different provision (the Fourteenth Amendment).

emergencies." 132 Cong. Rec. 21,660 (1986) (statement of Rep. Montgomery); see also H.R. Conf. Rep. No. 1001, 99th Cong., 2d Sess. 475 (1986). The limited – but still important – effect of the Montgomery Amendment is thus to preclude a governor from objecting to the active-duty use of federal forces on the basis of political disagreements with the federal government as to foreign or defense policy. Not surprisingly, amici have come forward with no evidence that the Framers intended to permit a governor, through employment of the State's militia, to interfere in such exclusively federal areas. See, *e.g.*, *United States* v. *Pink*, 315 U.S. 203, 233 (1942); *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-22 (1936).[22]

Finally, insofar as the Militia Clauses were intended to assure that States would retain forces for use in maintaining civil order, the current system fully protects that interest. Congress has expressly recognized that "[i]n addition to its National Guard, if any, a State * * * may * * * organize and maintain defense forces." 32 U.S.C. 109(c). These state defense forces may be used "within the jurisdiction concerned, as its chief executive * * * considers necessary." *Ibid.* The state defense force units themselves "may not be called, ordered, or drafted into the armed forces." 32 U.S.C. 109(c). Pursuant to this authorization, at least 30 States have enacted statutes providing for the organization of such defense forces. See note 5, *supra*.

[22] Amici also argue that to recognize the NGUS as an "Army" and not a "Militia" would "amount to unlawful Congressional abolition of the militia." Amici States Br. 42. In support of this argument, amici quote *United States* v. *Miller*, 307 U.S. 174, 178 (1939), in which this Court held that the Second Amendment was intended to "assure continuation and render possible the effectiveness of" the militia. Amici's argument is insubstantial. Although *Miller* indeed held that the intent of the Second Amendment was to preserve the militia from Congressional abolition, the means chosen to accomplish this purpose was to forbid Congress from infringing "the right of the people to keep and bear arms." No action taken by the federal government in this case even remotely detracts from the ability of state National Guardsmen to bear arms as appropriate to their tasks. In fact, by offering the States use of members of the NGUS at federal expense, the federal government has substantially *enhanced* the States' ability to maintain an effective militia.

The States thus maintain the ability to have forces available for use to maintain order or to perform any other function ordinarily assigned to the state National Guard. Under 10 U.S.C. 672(b) or (d), a governor may continue to refuse to consent to the activation of NGUS members from his State if they are needed in their status as state National Guard members. In cases in which NGUS members are ordered to active duty pursuant to a provision not requiring gubernatorial consent, *e.g.*, 10 U.S.C. 672(a), 673(a), 673b(a), or in cases in which the governor consents to federal activation pursuant to 10 U.S.C. 672(b) or (d), a State may maintain a state defense force to carry out functions that would ordinarily be assigned to the state National Guard. The current statutory scheme thus provides several layers of protection – including the limited gubernatorial veto and the ability to maintain state defense forces – for any State's legitimate interest in having a force available to maintain order.

C. *Nothing In The History Or Structure Of The Army Or Militia Clauses Suggests That Congress Can Exercise Power Over The NGUS Only In Accordance With The Limitations Of The Militia Clause*

1. Petitioners elaborately canvass the history of the framing and ratification of the Militia Clauses to indicate that the Clauses "embody a fundamental structural decision by the Framers concerning a core function of government." Pet. Br. 17. The Militia Clauses indeed reflected a compromise, resolving a dispute between those who favored state control over the militia[23] and those who sought to subject it to federal control to assure national security.[24] However, recounting the decision to

[23] Those who favored state control argued that, without a state military force, the States "would pine away to nothing after such a sacrifice of power." 2 M. Farrand, *The Records of the Federal Convention* 331 (Ellsworth) (1911) [hereinafter Farrand]. They also "took notice that the States might want their militia for defence against invasions and insurrections, and for enforcing obedience to their laws." 2 Farrand 332 (Sherman). And some believed that military power was not "as safe in the hands of eighty or a hundred men taken from the whole continent, as in the hands of two or three hundred taken from a single State." 2 Farrand 386 (Gerry).

[24] Among those who originally favored federal control were Madison, who proposed that power over the militia should be transferred entirely to the national government, the "authority charged with the public defense," 2 Farrand

limit the federal government's power over the militia does not address the central issue in this case: whether this compromise created a constitutional definition of "militia" applicable to the NGUS and superior to Congress's assertion of its Army Clause powers.[25]

The Army Clause too was a subject of debate at both the Convention itself and during the ratification process. As with the Militia Clauses, some were suspicious of federal power: Elbridge Gerry, for example, "thought an army dangerous in time of peace and could never consent to a power to keep up an indefinite number." 2 Farrand 329.[26] Others, however, believed that the Nation would not be able to defend itself if the federal government were not given broad power to create an army and navy. Alexander Hamilton, who had served on Washington's staff during the Revolutionary War, persuasively argued in The Federalist No. 25 that maintenance of a standing Army was essential to the Nation's survival. Although the militia "by their valor on numerous occasions, erected eternal monuments to

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332 (remarks of Madison), and Hamilton, who advanced a proposal that would have given the federal government primary control over the militia, see J. Madison, *Notes of Debates in the Federal Convention* 164 (Hunt ed. 1987). Others "saw no room for • • • distrust of the Genl Govt," 2 Farand 331 (Pinkney), and were "more apprehensive of the confusion of the different authorities on this subject than of either." 2 Farrand 331 (Langdon). They believed that national authority over the militia was necessary because "the Militia were every where neglected by the State Legislatures." 2 Farrand 387 (Randolph).

[25] Amicus National Guard Association of the United States argues that requiring training of the NGUS in Central America was simply the prescription of "discipline" permitted by the Militia Clauses. Because the NGUS is not a Militia Clause organization, Amicus errs in limiting Congress's power over the NGUS to the prescription of discipline. See note 40, *infra*. In any event, it is at best unclear that the term "discipline" was intended to have such a broad meaning. See 2 Farrand 385 (referring to "discipline" as "the manual exercise evolution &c").

[26] See also 2 Farrand 509 (Gerry), 616-617 (Mason, Madison); 2 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 136 (Nason) (2d ed. 1854) [hereinafter Elliot's Debates]; 3 Elliot's Debates 51 (Henry), 169 (Henry), 380 (Mason).

their fame," reliance on them as the "natural bulwark" of the "national defense • • • had like to have lost us our independence."[27] The Federalist No. 25, at 166 (C. Rossiter ed. 1961). Hamilton further noted that, because "[w]ar • • • is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice," it can be conducted "against a regular and disciplined foe only by a force of the same kind." *Ibid.*

Ultimately, the federalist view prevailed in the drafting and ratification of the Army Clause. In contrast to the carefully delineated division of powers of the Militia Clauses, the Army Clause contained only a single qualification—the requirement that appropriations for the Army be for no more than two years. Even that provision conferred no powers over the national defense on the States.[28]

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[27] Hamilton's words echo a letter written by Washington in 1776, in which he complained that "[i]f I was called upon to declare upon Oath • • • whether the Militia have been most serviceable or hurtful upon the whole; I should subscribe to the latter." See Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 183 (1940).

[28] Hamilton articulated the classic defense of the decision to grant Congress broad powers in the Army Clause:

> The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense.
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> Whether there ought to be a federal government intrusted with the care of the common defense is a question in the first instance open to discussion; but the moment it is decided in the affirmative, it will follow that that government ought to be clothed with all the powers requisite to the complete execution of its trust. And unless it can be shown that the

In view of the broad powers granted to Congress by the Army Clause, petitioners must advance some persuasive reason why those powers may not be used to create and maintain the NGUS. Repetition of the limitations embodied in the Militia Clauses is not enough to justify the wholesale limit on Congressional power to create an armed forces reserve that petitioners advocate.

2. Petitioners assert that the NGUS should be subject to the Militia Clauses because those Clauses were "intended as a check against the possibility of federal oppression." Pet. Br. 20. For support, they cite Madison's argument in The Federalist No. 46 that, if a "regular army, fully equal to the resources of the country, be formed" and set against the people of a State, the State would be able to defend itself with "a militia * * *, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence." The Federalist No. 46, at 299 (C. Rossiter ed. 1961).[29]

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circumstances which may affect the public safety are reducible within certain determinate limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted as a necessary consequence, that there can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essention to its efficacy—that is, in any matter essential to the formation, direction, or support of the National Forces.

The Federalist No. 23, at 153-154 (C. Rossiter ed. 1961) (emphasis omitted).

[29] Petitioners also cite Hamilton's statement in The Federalist No. 29 that the militia would provide the "best possible security" against a standing army. The Federalist No. 29, at 184-185 (C. Rossiter ed. 1961). Pet. Br. 20; see also Pet. App. A29 & n.18. Hamilton's argument, however, was not that the militia would provide a force that could be militarily pitted against a standing army. Rather, his point was that a well-governed militia would limit or eliminate the need for Congress to maintain a large standing army. Thus, immediately before the quoted words, Hamilton stated that the militia was "the only *substitute* that can be devised for a standing army." The Federalist No. 29, at 185 (Rossiter ed. 1961) (emphasis added). Elsewhere in The Federalist No. 29, Hamilton argued that federal power over the militia "ought, as far as possible to take away the inducement and the pretext" to a large standing army and would enable the federal government to "dispense with the employment" of a

Fears that a federal standing army could be employed to conquer a State were no doubt exaggerated at the time the Constitution was ratified. And unless one embraces the position that the Civil War was wrongly decided, no incident in the Nation's subsequent history suggests that protection of a State from conquest by the federal government ought to be a guiding factor in interpreting the Constitution's allocation of power between the States and the federal government. In any event, the hypothesized interest in state self defense does not support petitioners' bold claim to protection of an entirely separate interest—a State's claimed interest in participating in national foreign and defense policy. This case does not raise the spectre of federal "oppression" to which Madison referred in The Federalist No. 46.[30]

3. Finally, petitioners assert that "state control over the militias was designed as a check on federal military adventurism." Pet. Br. 20. Indeed, the threat that a state militia under federal control might be sent to a distant State for an unidentified purpose did surface in the ratification debates and was carefully answered by Madison.[31] But it is noteworthy that,

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standing army. *Id.* at 183. He concluded that "[t]o render an army unnecessary will be a more certain method of preventing its existence than a thousand prohibitions on paper." *Ibid.* Ironically, petitioners here object to Congress's effort to create the NGUS as a reserve force to limit the size of the standing army.

[30] It is difficult to conceive of circumstances today in which fear of a federal occupying army illegally conquering a State would have any substance. However, we note that, even if there were a legitimate state interest in protecting itself against such an eventuality, the current statutory scheme provides authority for the States to organize state defense forces pursuant to 32 U.S.C. 109(c).

[31] In Maryland, it was urged that Congress would use its power over the militia to "march the *whole* militia of Maryland to the *remotest* part of the Union, and keep them in service as long as they think proper." 3 Farrand 208 (Martin). In response to concerns of this type, Madison emphasized that the political structure of the federal government would make it unlikely that Congress's power over the militia would be abused by, for example, "drag[ging] the militia unnecessarily to an immense distance." 3 Elliot's Debates 381-382. Such abuses would be unlikely from "a government of a federal nature, con-

although a wide variety of reasons were given for state control of the militia, there was no recorded sentiment in favor of state control on the ground that States ought to have a means to influence the Nation's foreign or defense policy. In short, there is no evidence that the "military adventurism" feared was the training on foreign soil of federal troops who may one day be called upon to fight there. Nor is there any reason to believe that state power over the militia was to be the sole exception to the Framers' decision to vest power over foreign affairs and national security exclusively in the federal government.[32] See also *United States* v. *Pink*, 315 U.S. 203, 233 (1942) ("[p]ower over external affairs is not shared by the States"); *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-22 (1936).

D. *The History Of The NGUS/National Guard System Demonstrates Congress's Intent To Create A National Reserve Force, In Reliance Upon This Court's Holding In The* Selective Draft Law Cases

Petitioners assert that the Montgomery Amendment is "a departure from careful observance of the constitutionally mandated state character of the militia by Congress." Pet. Br. 26. This is a revisionist understanding of the pertinent history. Indeed, over a half century ago, it had become clear to Congress that a reserve force subject to the constraints of the Militia Clauses was inadequate for national security purposes. Thus, in 1933 Congress took decisive steps to create a reserve force pursisting of many coequal sovereignties, and particularly having one branch chosen from the people." *Ibid.* See also The Federalist No. 10 (Madison). Cf. *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 551 (1985) (quoting Madison's statement that the federal government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments").

[32] Even petitioners concede that the Framers "did not * * * intend the states to make positive national policy in the area of defense or foreign relations matters." Pet. Br. 47-48. Accord, Amici States Br. 4.

suant to its Army Clause powers and in express reliance on this Court's decision in the *Selective Draft Law Cases*. Far from showing Congressional recognition of petitioners' asserted constitutional imperative to structure the Nation's reserve forces under the Militia Clauses, Congress's actions since at least 1933 reveal precisely the opposite intent—to make use of its Army Clause powers to create a reserve force not subject to the limitations of the Militia Clauses. In any event, Congress's unusually explicit reliance on a particular source of authority—the Army Clause—and on particular decisions of this Court in providing for the security of this country give special force to the Court's recognition that "judicial deference * * * is at its apogee when legislative action under the congressional authority to raise and support armies * * * is challenged," *Goldman* v. *Weinberger*, 475 U.S. 503, 508 (1986) (quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981)).

1. *The Militia Act of 1792.* The Militia Act of 1792 (Act of May 8, 1792), ch. 33, 1 Stat. 271—the primary legislation concerning the militia until 1903—represented Congress's first effort to organize the militia. The Act provided generally that every able-bodied white man between 18 and 45 years of age was to be enrolled in the militia and required to equip and arm himself at his own expense. However, the Act imposed no requirements as to training, drills, or musters. An unfortunate consequence of these omissions was that during each armed conflict through the Spanish-American War, the militia proved militarily inadequate to meet the Nation's needs. The militia tended to be poorly organized, inadequately equipped, and insufficiently trained. Moreover, the worrisome possibility existed that the militia might refuse to execute federal assignments if there was uncertainty as to whether the limitations of the Militia Clauses applied. See H.R. Rep. No. 1066, 82d Cong., 1st Sess. 2-5 (1951); Wiener, 54 Harv. L. Rev. at 187-193; note 16, *supra*.

2. *The Dick Acts of 1903 and 1908.* In 1903, Congress enacted the Dick Act, Act of Jan. 21, 1903, ch. 196, 32 Stat. 775, to remedy some of the deficiencies of the militia system. See H.R. Rep. No. 1094, 57th Cong., 1st Sess. (1902); S. Rep. 2129, 57th Cong., 2d Sess. (1902). See also H.R. Rep. No. 1066,

supra, at 2-5; Wiener, 54 Harv. L. Rev. at 193-195. The Dick Act provided for an organized militia, to be known as the National Guard, that would be equipped through federal funds, be trained by Regular Army instructors, and conform to the Regular Army organization. Under the Dick Act, the National Guard could be ordered into federal service, however, only in the three situations enumerated in the Militia Clauses. The National Guard was then, as it is now, a Militia Clause organization. Like its forerunner, the Act made no provision for an organization comparable to the NGUS.

In 1908, Congress passed the Second Dick Act (Act of May 27, 1908) ch. 204, § 4, 35 Stat. 400, which purported to make National Guard units available for extraterritorial service. By permitting the President to summon the Guard for federal service "either within or without the territory of the United States," § 5, 35 Stat. 400, the Act authorized the federal government to use Guardsmen to meet the type of military situations that in 1846 (the Mexican-American War) and again in 1898 (the Spanish-American War) had necessitated resort to volunteers. See H.R. Rep. No. 1067, 60th Cong., 1st Sess. (1908); S. Rep. No. 630, 60th Cong., 1st Sess. (1908).

The constitutionality of the Second Dick Act was never judicially tested. Following its enactment, however, Attorney General Wickersham rendered a formal opinion that, because the National Guard remained a militia, there was no constitutional warrant for the Act's provision permitting use of the National Guard for general military purposes outside national boundaries. See 29 Op. Att'y Gen. 322 (1912). This opinion remains as the basis for the view that the Militia Clauses do not permit the militia to be ordered outside the United States. Wiener, 54 Harv. L. Rev. at 188-189.

3. *The National Defense Act of 1916.* In 1916, in response to the concerns articulated by Attorney General Wickersham, as well as military events on the Mexican border and in Europe, see Wiener, 54 Harv. L. Rev. at 199, Congress passed the National Defense Act of 1916 (Act of June 3, 1916), ch. 134, 39 Stat. 166. The 1916 Act dramatically increased federal regulation of the National Guard by dictating its organization and the qualifications of its personnel.[33] More significantly, however, the Act required Guardsmen to take oaths to obey both the President and their state governor. This dual oath of allegiance was thought to enable the President to draft individual Guardsmen into the army in time of war, thus making them available for service beyond the continental borders. See Act of June 3, 1916, §§ 70, 73, 112, ch. 134, 39 Stat. 201, 211.[34] As previously noted, the

[33] The Act reserved to the States the authority to appoint officers of the National Guard as required by the Militia Clauses; significantly, however, the Act prescribed the qualifications for the appointment of such officers, and provided for their recognition by federal authorities and for their removal should they be found disqualified. See Act of June 3, 1916, ch. 134, §§ 74, 75, 77, 79, 39 Stat 201-202, 202, 202-203. Analogous provisions survive today. See 32 U.S.C 301, 307-310, 323-324. The Act also required the Guard to train more extensively, and it provided that the Guard was to receive federal pay for armory drills, administrative work, and field encampments. Act of June 3, 1916, §§ 92, 109, 110, 39 Stat. 206, 210. Finally, the Act provided that the Guard was to be organized so as to form complete tactical units in conformity with the organization of the Regular Army. §§ 60, 64, 39 Stat. 197, 198-199.

[34] One commentator suggested that the draft provisions of the 1916 Act were unconstitutional because the taking of the federal oath of allegiance by members of the militia

> would seem to constitute an express waiver of their constitutional right to object to a draft for other than the constitutionality specified purpose [provided in the Militia Clauses]. Congress accomplishes this result by using its constitituional power to organize the militia to abolish the constitutional limitations placed on its use of the militia. A state is given the choice of having no militia or one unprotected by constitutional guarantees. The net result is that the old sort of militia, known to the Constitution, is to be done away with.

Note, *The Status of State Militia Under the Hay Bill,* 30 Harv. L. Rev. 176, 178-79 (1916).

This view, however, was rejected by the House Military Affairs Committee, see H.R. Rep. No. 297, 64th Cong., 1st Sess. 2-9 (1916). Its weak point, stated a contemporary commentator, was the assumption that members of the militia could not be drafted into the Army and thus become available for general military service:

> A militiaman, organized or unorganized, is a citizen. Concededly an unorganized, or reserve, militiaman is subject to draft; otherwise, since all arms-bearing citizens are such militia, whence shall our armies come? An organized militiaman is no less a citizen and is much better prepared,

Court in the *Selective Draft Law Cases*, 245 U.S. 366 (1918), and *Cox* v. *Wood*, 247 U.S. 3 (1918), upheld Congress's power under the Army Clause to draft members of the militia into active duty service on behalf of the United States.

4. *The National Defense Act of 1933*. The National Defense Act of 1933 ch. 87, 48 Stat. 153, created the NGUS and the dual enlistment system. The state National Guard remained subject to the Militia Clause. See H.R. Rep. No. 141, 73d Cong., 1st Sess. 4 (1933). Congress, however, expressly exercised its Army Clause power in creating the NGUS as a reserve component of the national armed forces. H.R. Rep. No. 141, *supra*, at 3. In keeping with Congress's assessment of the Nation's security needs in the mid-1930's, the NGUS was to be available only in wartime.[35] Significantly, however, the Act did not require the consent of any state authorities to order the NGUS to active duty; indeed, there is no discussion of such a provision in the Congressional reports.

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largely at Federal expense, to make an effectual contribution to the country's cause in time of war.

Ansell, *Status of State Militia Under the Hay Bill*, 30 Harv. L. Rev. 712, 723 (1917).

[35] Section 5 of the statute provided that "in time of peace, [the members of the NGUS] shall be administered, armed, uniformed, equipped, and trained in their status as the National Guard of the several States." 48 Stat. 156, 32 U.S.C. 4a (1934), repealed, Armed Forces Reserve Act of 1952, ch. 608, § 803, 66 Stat. 505. Congress's decision that, under the political and military situation facing the nation in 1933, the NGUS would be needed only in a war does not suggest that Congress believed that, as a matter of constitutional law, the NGUS could only be available under such circumstances. Still less does it provide any basis for petitioners' argument that today, long after this limitation was removed from the statute, the Court should require such a limitation as a matter of constitutional law. Pet. Br. 37-38. As we discuss below, see *infra* at 42-46, petitioners' entirely novel theory that the Militia Clauses can be "trumped" by the Army Clause only in the event of a war or national emergency appropriately declared by Congress or the President has no basis in the text or history of the Constitution. There is in addition no mention of this theory in the legislative history of the 1933 Act, nor is there any indication whatsoever that Congress limited use of the NGUS to wartime to avoid perceived constitutional objections.

Congress's stated purpose in creating the NGUS was to make it available for federal duty outside the limitations of the Militia Clauses—as the *Selective Draft Law Cases* permit—but in a manner that obviated the need to draft National Guard members individually. H.R. Rep. No. 141, *supra* at 4-5. The legislative history shows unusually explicit reliance by Congress on this Court's construction of the Army and Militia Clauses in the *Selective Draft Law Cases*. See S. Rep. No. 135, 73d Cong., 1st Sess. 2 (1933); H.R. Rep. No. 141, 73d Cong., 1st Sess. 1-6 (1933).[36] The basic assumption underlying the current structure of the armed forces—that the NGUS will be available to assist in whatever military missions must be carried out, regardless of the specific limitations in the Militia Clauses—is thus rooted in Congress's reliance on the broad interpretation of the Army Clause in the *Selective Draft Law Cases*.

5. *The Armed Forces Reserve Act of 1952*. Following World War II and during the Korean Conflict, Congress enacted the Armed Forces Reserve Act of 1952 to strengthen the reserve components of the Armed Forces. See Act of July 9, 1952, ch. 608, 66 Stat. 481. This Act further integrated the NGUS into the structure of the armed forces.

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[36] For example, H.R. Rep. No. 141, *supra*, at 3, concludes:

> [T]here is no constitutional or legal objection to the creation through appropriate amendments of the National Defense Act, of the "National Guard of the United States" as a reserve organization of the Army of the United States, under the Army provisions of the Constitution, leaving the National Guard of the States, Territories, and the District of Columbia, organized under the militia provisons of the Constitution, intact and unaffected by such amendments.

This conclusion was based directly upon this Court's decision (H.R. Rep. No. 141, *supra*, at 4):

> The constitutional and legislative validity of the amendment to the National Defense Act to be proposed * * * is established by the decisions of the Supreme Court of the United States. (*Tarble's case*, 80 U.S. (13 Wall.) 397, 408; *Arver* v. *United States*, (selective draft cases), 245 U.S. 366.).

The Report went on to quote extensively from the *Selective Draft Law Cases* opinion.

For present purposes, the most significant feature of the 1952 Act was its modification of the circumstances under which the NGUS could be ordered into active duty. The provision of the 1933 Act limiting activation of the NGUS to wartime was eliminated. 66 Stat. 505; see note 35, *supra*. In its place, the statute added 10 U.S.C. 672(b) and (d), the provisions at issue in this case. These provisions permit use of the NGUS for any purpose – not merely training – without regard to the existence or declaration of a war or national emergency. These provisions thus contrasted sharply with the provisions governing federalization of the National Guard, which are limited to the situations enumerated in the Militia Clauses.

The 1952 Act was the first statute governing the NGUS containing a gubernatorial consent provision.[37] Although Congress had passed a series of statutes between 1933 and 1952 governing activation of the NGUS, none required gubernatorial consent.[38] In particular, although one provision expressly authorized activation of the NGUS for *training*, there was no mention of any right of a governor to consent or veto activation of the NGUS for this purpose.[39] In light of this provision, petitioners' assertion that the Montgomery Amendment marked the first time that the "reserved authority for militia training" was not observed is off target. See, *e.g.*, Pet. Br. 30.

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[37] Although questions concerning the constitutionality of the bill were raised at the hearings, see *Reserve Components: Hearings on H.R. 4860 Before the House Comm. on Armed Services*, 82d Cong., 1st Sess. 475-76, 482-83 (1951), the gubernatorial consent provision itself was never mentioned. See *id.* at 788, 798.

[38] See Act of June 19, 1935, ch. 277, 49 Stat. 391 (amending Section 38 of the National Defense Act of 1916 to provide for activation of the NGUS in a national emergency for not more than 15 days unless the emergency was declared by Congress, with no provision for gubernatorial consent); Act of June 15, 1933, ch. 87, § 38, 48 Stat. 155 (amending Section 38 of the National Defense Act of 1916 to authorize activation of NGUS officers for service in the general staff or the National Guard Bureau, with no provision for gubernatorial consent).

[39] See Act of March 25, 1948, ch. 157, § 5(a), 62 Stat. 90, amending Section 92 of the National Defense Act of 1916 (39 Stat. 206) to authorize training for the NGUS on the same basis as for the Organized Reserve Corps. Cf. S. Rep. No. 625, 80th Cong., 1st Sess. 4 (1947).

6. *The Montgomery Amendment*. Between 1952 and 1986, when Congress enacted the Montgomery Amendment, 10 U.S.C. 672(f), the role of the NGUS in the Nation's defense structure became even more significant. As the Nation's global responsibilities grew, reliance on non-active duty forces, including the NGUS, increased. As former Assistant Secretary of Defense James Webb testified, under the "Total Force" concept, which has governed strategic planning since the early 1970's, the national security increasingly depends on the ability to "mobilize, deploy and employ" NGUS units anywhere in the world where military force is needed J.A. 13. See also H.R. Rep. No. 1069, 94th Cong., 2d Sess. 3-5 (1976). Given the global responsibilities assigned to the NGUS, "effective and realistic training throughout the world is a necessity * * * owed to those guardsmen who will be committed to the battlefield, to enhance their proficiency and ability to fight and survive." J.A. 13. Accordingly, by 1985, more than 39,000 NGUS troops annually were being trained overseas in more than 44 different countries. J.A. 20.

The Montgomery Amendment is simple and straightforward – it prohibits a governor from withholding consent to a NGUS member or unit being ordered to active duty for service outside the United States "because of any objection to the location, purpose, type, or schedule of such active duty." By the time the Montgomery Amendment was enacted, the role of the NGUS as a full-fledged component of the national armed forces was well-established. As Rep. Montgomery explained during the debate, the NGUS cannot be assigned crucial overseas missions "[i]f the Defense Department has to worry about whether a Governor is going to block his or her units from going to training exercises in Europe or elsewhere." 132 Cong. Rec. 21,660 (1986). Far from marking a break with past tradition, therefore, the Montgomery Amendment follows directly from the decision to create the NGUS as an Army Clause organization available for any mission that may be carried out by this Nation's military forces.

E. *Petitioners' Suggestion That the Federal Government May Contravene The Limitations Of The Militia Clauses Only After Declaration Of A War Or National Emergency Has No Support In The Constitution's Text or History*

The claim that the Constitution requires that the NGUS be treated as a "militia" leads to the conclusion that the federal government may use the NGUS only for the three purposes enumerated in the Militia Clauses—to execute federal law, repel invasions, and suppress insurrections. What is more, under this view the federal government may not train the NGUS at all, even for use in the three Militia Clause-sanctioned circumstances. This is a pivotal deficiency of petitioners' claim, since it essentially renders impossible the objective of the dual enlistment system—combining the federal need to maintain a sizeable armed forces reserve at federal expense with the States' desire to maintain state militia forces at virtually no cost to themselves. In short, if the federal government cannot achieve its objective of maintaining the NGUS as a genuine armed forces reserve, available for any military mission to which it may be assigned, there would be no point to the creation of the NGUS and the maintenance of the dual enlistment system.[40]

[40] This view is a necessary consequence not only of the position advanced by petitioners in this litigation, but also of the position advanced by the amicus National Guard Association of the United States. Amicus argues that the authority of Congress to discipline the militia pursuant to the Militia Clauses is "broad enough to encompass orders for National Guard units to conduct peacetime training missions overseas," see Motion of Amicus for Leave to Participate in Oral Argument at 4 (filed February 23, 1990). The argument erroneously presupposes that the National Guard was ordered to train in Honduras; in fact, it was the NGUS that was ordered to so train. More importantly, however, the argument suggests, as does that of petitioners, that federal control of the NGUS is governed by the Militia Clauses, which include the restrictions of Clause 15 on permissible uses of the militia. Although amicus argues that the "case can and should be resolved without ever reaching the much broader Army Clause argument raised by the federal government," *id.* at 5, to decide the case on the grounds advanced by amicus would necessarily be to proceed on the mistaken assumption that the NGUS is a "militia" under the Constitution. It is emphatically not. The case thus squarely raises the question of whether the NGUS must constitutionally be treated as "militia," and this Court should decide the case on that ground.

Apparently recognizing that this result of their position is unacceptable, petitioners seek to escape it by adopting the view of the dissent below that "before the federal government can exercise its army power to supersede the reserved state authority over the militia, its actions must be motivated by a 'national exigency' " that must be identified in an "affirmative declaration" by Congress or the President. Pet. App. A41-A42; see also Pet. Br. 10, 21, 21 25-26, 33-37. This is entirely made up. Petitioners' novel constitutional theory is without a shred of support in the text or history of the Constitution. It should be firmly rejected.

Petitioners' theory has two components, both of which are implausible. First, the theory requires that the three purposes enumerated in Clause 15 be construed merely as specific illustrations of a generic "exigent circumstances" requirement for which the militia could be called out. Second, and even more unlikely, petitioners' theory implies that the Constitution itself imposes a specific procedural requirement—"an affirmative declaration"—that must be met by Congress or the President before the full scope of federal powers under the Army Clause can be exercised.

1. The text of the Constitution lends no support to the theory that the three enumerated purposes in Clause 15 should be read to refer more generally to any "national exigency." Clause 15 refers in specific terms to three particular circumstances. There is no mention of the word "exigency" or "emergency" in the Militia Clauses. Although there is undoubtedly room for debate over the scope of the specific terms used in Clause 15—and, in particular, over the scope of use permitted under the category of "repelling invasions"—there is nothing in the text to suggest that the specific terms of the Militia Clauses, which after all were a carefully crafted compromise between those who feared national power and those who believed that the national government must be in full control of all military forces, ought to be ignored.

Nor does the text of the Constitution lend any support to the procedural requirement that a national emergency must be declared before the militia may be used for a purpose not specified in Clause 15. In the rare instances in which the

Framers sought to impose procedural requirements on the exercise of particular powers, they did so in specific terms. See Art. I, § 3, Cl. 6 (Senate shall be on oath when trying any impeachment); Art. I, § 9, Cl. 7 (statement of receipts and expenditures shall be published from time to time); Art. II, § 1, Cl. 8 (oath prescribed for President). In interpreting one of the Constitution's affirmative grants of power, it is inappropriate for the Judiciary—absent specific constitutional warrant—to require that Congress or the President engage in a particular procedural exercise before they are permitted to employ powers conferred upon them by the Constitution.

2. In support of their creative position concerning the necessity for a declared national emergency, petitioners quote a number of passages from the Framers to the effect that the federal government's authority would be "most extensive and important in times of war and danger," The Federalist No. 45, at 293 (Madison) (C. Rossiter ed. 1961); that the impossibility of foreseeing future "natural exigencies" rendered it necessary that "there can be no limitation of that authority which is to provide for the defense and protection of the community," The Federalist No. 23 at 154 (Hamilton); and that the militia would be prepared "for every military exigency of the United States," 12 J. Sparks, *The Writings of George Washington* 39 (1839). See Pet. Br. 25-26, 43.

Quotations of this kind are undoubtedly helpful in providing guidance in the interpretation of problematic portions of the constitutional text. But general statements of purpose do not supersede the particular terms of constitutional provisions. None of the passages invoked by petitioners addresses the question whether the specific terms of Clause 15 should be ignored in favor of a general "national exigency" requirement. Moreover, it is mistaken to argue that the Hamilton quotation, indicating that Congress's Army Clause powers are broad in order to confront national emergencies, entails the conclusion that Congress's Army Clause powers are weak in instances in which no national emergency has been declared. The plenary power granted to Congress by the Army Clause, see, *e.g.*, *Rostker* v. *Goldberg*, 453 U.S. 57, 70-72 (1981); *United States* v. *O'Brien*,

391 U.S. 367, 377 (1968), gives Congress the ability to deter war by preparing for it in advance, not simply the power to respond to aggression after the fact.

3. Finally, petitioners assert that this Court's decision in the *Selective Draft Law Cases*, 245 U.S. 366 (1918), requires that the broad Army Clause power can be employed only in the event of declared war or national emergency. In support of this assertion, petitioners seize upon the Court's statement that "[t]he duty of exerting the [Army Clause] power * * * was wisely left to depend upon the discretion of Congress as to the arising of the *exigencies* which would call it in part or in whole into play." 245 U.S. at 382-383 (emphasis added).

Petitioners' reading of the *Selective Draft Law Cases* is mistaken. The Court indeed referred to 'exigencies," as did Hamilton in the passage discussed above, to justify the breadth of the Army power. But the Court, like Hamilton, did not believe that the Army Clause powers were limited to such circumstances. In the very passage cited, the Court indicated that it was for Congress—not the Judiciary—to determine when the needs of national security justified exercise of the Army Clause power. In this case, Congress has determined that national security interests require a broad delegation of authority to the President to activate the NGUS for training or other purposes under 10 U.S.C. 672(b) and (d), so that the "exigency" of aggression may be deterred or, if deterrence is not possible, confronted. There is no warrant in the *Selective Draft Law Cases* to impose any additional requirements on the exercise of the federal government's powers.[41]

[41] Petitioners also cite the Court's statment that the Militia Clauses "diminished the occasion for the exertion by Congress of its military power beyond the strict necessities for its exercise," 245 U.S. at 383, as support for the proposition that Congress could only exercise its Army Clause powers over the NGUS where a "strict necessity," *i.e.*, a declared national exigency, existed. Far from limiting the use to which Congress may put the militia, the Court in this passage was explaining that the availability of the militia may make it unnecessary for the federal government to maintain a large standing army. Nothing in the passage suggests that Congress's decision to employ its Army Clause powers is limited to situations in which it has declared a national exigency.

The *Selective Draft Law Cases* arose, of course, during World War I. The great conflagration thus provided the dramatic backdrop against which the Court's opinion was fashioned. Petitioners' effort to interpret the Court's opinion in those cases to require the existence and declaration of a national exigency before Congress may fully employ its Army Clause powers is essentially an attempt to confine the *Selective Draft Law Cases* to their facts. That will not do. Simply as an interpretation of the Court's opinion, petitioners' suggestion is implausible. But in addition, it ignores the fact that Congress has expressly relied on the broad reaffirmation of its Army Clause powers in the *Selective Draft Law Cases* to structure the armed forces on which the security of this Nation depends. See pp. 38-39, *supra*. In light of this reliance, it would be particularly inappropriate now to reconsider this Court's settled precedents from over seventy years ago.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Army Clause (U.S. Const. Art. I, § 8, Cl. 12) provides:

> [The Congress shall have Power] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; * * *.

The Militia Clauses (U.S. Const. Art. I, § 8, Cls. 15 and 16) provide:

> [The Congress shall have Power] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; * * *.

10 U.S.C. 672(b) and (d) provide:

§ 672. Reserve components generally

* * * * *

(b) At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor of the State or Territory or Puerto Rico or the commanding general of the District of Columbia National Guard, as the case may be.

* * * * *

(d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriation authority of the State or Territory, Puerto Rico, or the District of Columbia, whichever is concerned.

* * * * *

The Montgomery Amendment, 10 U.S.C. 672(f), provides:

(f) The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

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